

**A Tekun Nasional v Plenitude Drive (M) Sdn Bhd and another
appeal**

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-90–10
OF 2018(W) AND 02(f)-92–10 OF 2018(W)
ROHANA YUSUF PCA, ZAWAWI SALLEH AND HASNAH HASHIM
FCJJ
10 SEPTEMBER 2021

C *Contract — Damages — Assessment — High Court found that respondent failed to adduce sufficient evidence to prove quantum of damages but ordered for assessment of damages — Court of Appeal held that cl 11.2 of agreement was penalty clause and therefore void under s 75 of the Contracts Act 1950 — Whether the case of Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 6 MLJ 15 applicable to the present case — Whether respondent had proven damages based on formula stated in cl 11.2 of the agreement — Whether respondent entitled to claim for general damages — Whether amount claimed under agreement was exorbitant and unreasonable — Whether cl 11.2 of agreement was penalty clause — Contracts Act 1950 s 75*

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The present appeals concerned the application of s 75 of the Contracts Act 1950 ('the CA') in relation to the assessment of damages arising out of a termination of an agreement. Tekun ('the appellant') was an agency established under the Ministry of Entrepreneur Development to provide simple and quick financing facilities to Bumiputras to kick-start and further expand their businesses. The appellant had entered into an agreement ('the agreement') with Plenitude Drive (M) Sdn Bhd ('the respondent') whereby the respondent agreed to develop the MG and SI system for the appellant for purposes of collection of loan repayment. Later, due to the refusal of the appellant to proceed with the MG System, the respondent terminated the agreement and brought an action against the appellant for breach of agreement. The High Court allowed the respondent's claim on liability but dismissed the stipulated damages of RM29,829,132.40 because the claim for the said amount was a claim for special damages based on the formula under cl 11.2 of the agreement which was against s 75 of the CA. The High Court ordered damages to be assessed. At the appeal stage, the Court of Appeal found no appealable error on issue of liability, but the Court of Appeal disagreed with the High Court that the claim of RM29,829,132.40 was a claim for damages. The Court of Appeal found the amount claimed by the respondent was damages quantified in accordance with the agreed formula as provided under cl 11.2 of the agreement, but the said amount was a penalty and not claimable under s 75 of the CA. Nevertheless, the Court of Appeal stated that the respondent was entitled to be compensated for any loss or damage resulting from the breach

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including its loss of earnings and profits, though it could not rely on cl 11.2 of the agreement to stake its claim. The Court of Appeal then dismissed the appeals and ordered the matter to be remitted to the High Court for assessment of damages. The Federal Court granted leave to appeal the following questions of law: (a) whether the High Court, in a trial on both liability and damages for breach of contract, had any residual jurisdiction to order for assessment of damages, after it had delivered judgment and held that the plaintiff had failed to prove the damages at the trial; (b) whether a litigant who wished to rely on s 75 of the CA must raise it in the pleadings; and (c) whether a litigant who wished to rely on s 75 of the CA to defeat a claim based on a contractual provision fixing a formula for computation of the amount of damages must prove that the provision was a penalty.

Held, allowing the appeal in part with costs of RM120,000 here and below subject to allocator, affirming the decision of the Court of Appeal on the issue of liability and varying the order for damages to be assessed and substituted with an order that a sum of RM5,000 be awarded as nominal damages:

- (1) For a decision to be binding retrospectively, the case must still be at the trial stage to enable the parties to prepare and argue their case, be it a plaintiff or defendant, based on the burden of proof applicable at that material time. If the case of *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15 ('the case of *Cubic*') was applicable, the appellant must adduce evidence to prove that the damages claimed by the respondent was unreasonable. The case of *Cubic* should not be applicable retrospectively to cases where full trial had completed and decided by the court of first instance. The Court of Appeal had decided based on the law applicable at that material time. The onus of proof in relation to s 75 of the CA at that material time lay on the respondent. In this case, the retrospectivity of *Cubic* would cause manifest injustice to the appellant. Therefore, it stands to reason that *Cubic* would only apply prospectively. That was, to cases where trials had not been completed (see paras 32 & 38).
- (2) Before the case of *Cubic*, in applying s 75 of the CA, the burden of proof lay on the plaintiff to show that the damages as stipulated in the contract was a reasonable compensation by reference to the loss sustained by the plaintiff in consequence of the defendant's breach. In determining the reasonableness of the amount, the court must give due regards to the evidence of actual loss adduced by the plaintiff. This burden of proof upon the plaintiff as the claimant was consistent with the classic juridical principle stating that 'he who asserts must prove' (see para 35).
- (3) It was trite law that the party claiming damages, special or general, bore the burden of proving the fact and quantum of damages suffered. Further, when there was a clause on damages, the court must evaluate the

- A reasonablyness of the clause in question. As a party who had suffered loss or damages as a result of the breach by the appellant, the respondent would be entitled to be compensated. However, based on the appeals record, there was no evidence of damages, whether oral or documentary, proven by the respondent to justify the claim for damages based on the agreed formula (see paras 54 & 66–67).
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- (4) The formula required the respondent to show its earnings preceding 12 months prior to the termination and the said figure must be factored in the calculation, multiply by the unexpired term and the duration of the agreement. Further, under cl 11.2 of the agreement the right could only be invoked if the agreement runs for 12 months. In the present case the agreement was terminated by the respondent less than 12 months therefore under the circumstances the formula as stipulated under cl 11.2 could not be invoked. On the facts and evidence, the respondent failed to prove the sum claimed based on the formula. An award of damages must be proportionate to the loss suffered. The respondent failed to prove its losses in order to receive the benefit of cl 11.2 and must also necessarily failed to prove its losses in its claim for general damages (see paras 68–69).
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- E (5) The court agreed with the Court of Appeal that cl 11.2 was a penalty clause under s 75 of the CA. It was settled law that if a sum was named in a contract was exorbitant and unreasonable for it to be paid in case of breach, it ought to be treated as a penalty and therefore void under s 75 of the CA. The learned High Court judge should have dismissed the stipulated amount since there was no evidence adduce to support the amount or any amount to be decided by the court. The learned High Court judge had misdirected himself when he ordered damages to be assessed after having concluded that the respondent had failed to adduce sufficient evidence to sustain its case on the quantum of damages. In the circumstances, hearing of the assessment of damages would not only be a second bite of the cherry for the respondent but also a waste of judicial time and resources. In view of the appellant's breach, the court agreed that the appellant was liable for damages suffered by the respondent. However, since the respondent failed to prove damages, the court allowed nominal damages (see paras 71–73).
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- H (6) Since the law on s 75 of the CA now had already been decided by the Federal Court in the case of *Cubic*, the court did not find it necessary to answer the questions posed in the present appeal (see para 75).

I **[Bahasa Malaysia summary]**

Rayuan ini berkaitan dengan pemakaian s 75 Akta Kontrak 1950 ('AK') berhubung dengan taksiran ganti rugi yang timbul daripada penamatan perjanjian. Tekun ('perayu') adalah sebuah agensi yang ditubuhkan di bawah Kementerian Pembangunan Usahawan untuk menyediakan kemudahan

pembiayaan yang mudah dan cepat kepada Bumiputera untuk memulakan dan mengembangkan lagi perniagaan mereka. Perayu telah menandatangani perjanjian ('perjanjian tersebut') dengan Plenitude Drive (M) Sdn Bhd ('responden') di mana responden bersetuju untuk membangunkan sistem MG dan SI untuk perayu bagi tujuan kutipan bayaran balik pinjaman. Kemudian, disebabkan keengganan perayu untuk meneruskan Sistem MG, responden menamatkan perjanjian dan memfailkan tindakan terhadap perayu kerana melanggar perjanjian. Mahkamah Tinggi membenarkan tuntutan responden berkenaan dengan liabiliti tetapi menolak ganti rugi yang ditetapkan sebanyak RM29,829,132.40 kerana tuntutan untuk jumlah tersebut adalah tuntutan ganti rugi khas berdasarkan formula di bawah klausa 11.2 perjanjian yang bertentangan dengan s 75 AK. Mahkamah Tinggi mengarahkan penilaian ganti rugi dilakukan. Pada peringkat rayuan, Mahkamah Rayuan memutuskan bahawa tidak terdapat kekhilafan yang boleh dirayu dalam isu liabiliti, tetapi Mahkamah Rayuan tidak bersetuju dengan Mahkamah Tinggi bahawa tuntutan RM29,829,132.40 adalah tuntutan ganti rugi. Mahkamah Rayuan mendapati jumlah yang dituntut oleh responden adalah ganti rugi yang dikira mengikut formula yang dipersetujui seperti yang diperuntukkan di bawah klausa 11.2 perjanjian, tetapi jumlah tersebut adalah penalti dan tidak boleh dituntut di bawah s 75 AK. Namun begitu, Mahkamah Rayuan menyatakan bahawa responden berhak mendapat pampasan untuk apa-apa kerugian atau kerosakan akibat pelanggaran termasuk kehilangan pendapatan dan keuntungannya, walaupun dia tidak boleh bergantung kepada klausa 11.2 perjanjian untuk membuktikan tuntutanannya. Mahkamah Rayuan kemudiannya menolak rayuan dan memerintahkan agar kes diserahkan kepada Mahkamah Tinggi untuk penilaian ganti rugi. Mahkamah Persekutuan memberi kebenaran rayuan bagi persoalan-persoalan undang-undang berikut: (a) sama ada Mahkamah Tinggi, dalam perbicaraan ke atas kedua-dua liabiliti dan ganti rugi bagi pelanggaran kontrak, mempunyai apa-apa bidang kuasa lain untuk memerintahkan taksiran ganti rugi, selepas mahkamah memberikan penghakiman dan berpendapat bahawa plaintif telah gagal membuktikan tuntutan ganti ruginya semasa perbicaraan; (b) sama ada pihak litigasi yang ingin bergantung kepada s 75 AK mesti membangkitkannya dalam pliding; dan (c) sama ada pihak litigasi yang ingin bergantung kepada s 75 AK untuk mengalahkan tuntutan berdasarkan peruntukan kontrak yang menetapkan formula untuk pengiraan jumlah ganti rugi mesti membuktikan bahawa peruntukan tersebut adalah penalti.

Diputuskan, membenarkan sebahagian rayuan dengan kos RM120,000 di mahkamah ini dan mahkamah bawahan tertakluk kepada alokator, mengesahkan keputusan Mahkamah Rayuan berkenaan isu liabiliti, mengubah perintah penaksiran ganti rugi dan menggantikannya dengan perintah agar jumlah RM5,000 diberikan sebagai ganti rugi nominal:

- (1) Untuk memastikan sesuatu keputusan mengikat secara retrospektif, kes

- A tersebut mestilah masih di peringkat perbicaraan untuk membolehkan pihak-pihak menyediakan dan menghujahkan kes mereka, sama ada plaintif atau defendan, berdasarkan beban pembuktian yang terpakai pada masa yang material. Jika kes *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15 ('kes *Cubic*') terpakai, perayu mesti mengemukakan keterangan untuk membuktikan bahawa ganti rugi yang dituntut oleh responden adalah tidak munasabah. Kes *Cubic* tidak boleh digunakan secara retrospektif kepada kes di mana perbicaraan penuh telah selesai dan diputuskan oleh mahkamah bicara. Mahkamah Rayuan telah memutuskan berdasarkan undang-undang yang terpakai pada masa yang material. Tanggungan pembuktian berhubung dengan s 75 AK pada masa yang material terletak pada responden. Dalam kes ini, penggunaan *Cubic* secara retrospektif akan menyebabkan ketidakadilan yang nyata kepada perayu.
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- D Oleh itu, adalah wajar bahawa *Cubic* hanya akan digunakan secara prospektif. Iaitu, untuk kes di mana perbicaraan belum selesai (lihat perenggan 32 & 38).
- E (2) Sebelum kes *Cubic*, dalam menggunakan s 75 AK, beban pembuktian terletak pada plaintif untuk menunjukkan bahawa ganti rugi seperti yang ditetapkan dalam kontrak adalah pampasan yang munasabah dengan merujuk kepada kerugian yang dialami oleh plaintif akibat daripada pelanggaran defendan. Dalam menentukan kemunasabahan jumlah tersebut, mahkamah mesti memberi perhatian sewajarnya kepada keterangan berkenaan dengan kerugian sebenar yang dikemukakan oleh plaintif. Beban pembuktian ke atas plaintif sebagai pihak yang menuntut adalah konsisten dengan prinsip perundangan klasik yang menyatakan bahawa 'he who asserts must prove' (lihat perenggan 35).
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- G (3) Sudah menjadi undang-undang yang mantap bahawa pihak yang menuntut ganti rugi, khas atau am, menanggung beban untuk membuktikan fakta dan jumlah ganti rugi yang dialami. Selanjutnya, apabila terdapat klausa mengenai ganti rugi, mahkamah mesti menilai kemunasabahan klausa berkenaan. Sebagai pihak yang telah mengalami kerugian atau kerosakan akibat kemungkiran oleh perayu, responden berhak mendapat pampasan. Bagaimanapun, berdasarkan rekod rayuan, tiada keterangan berkenaan ganti rugi, sama ada lisan atau dokumentari, dibuktikan oleh responden untuk mewajarkan tuntutan ganti rugi berdasarkan formula yang dipersetujui (lihat perenggan 54 & 66–67).
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- I (4) Formula tersebut memerlukan responden untuk menunjukkan pendapatannya 12 bulan sebelum penamatan perjanjian tersebut dan angka tersebut mesti diambil kira dalam pengiraan, didarab dengan tempoh yang belum tamat dan tempoh perjanjian. Selanjutnya, di bawah klausa 11.2 perjanjian tersebut, hak tersebut hanya boleh digunakan jika perjanjian tersebut berjalan selama 12 bulan. Dalam kes ini, perjanjian

- tersebut telah ditamatkan oleh responden kurang daripada 12 bulan, oleh itu, dalam keadaan tersebut, formula seperti yang ditetapkan di bawah klausa 11.2 tidak boleh digunakan. Berdasarkan fakta dan keterangan, responden gagal membuktikan jumlah yang dituntut berdasarkan formula tersebut. Pemberian ganti rugi mestilah setimpal dengan kerugian yang dialami. Responden gagal membuktikan kerugiannya untuk menerima manfaat klausa 11.2 dan semestinya juga gagal membuktikan kerugiannya dalam tuntutan ganti rugi amnya (lihat perenggan 68–69).
- (5) Mahkamah bersetuju dengan Mahkamah Rayuan bahawa klausa 11.2 adalah klausa penalti di bawah s 75 AK. Undang-undang adalah mantap bahawa jika jumlah yang dinyatakan dalam kontrak adalah terlalu tinggi dan tidak munasabah untuk dibayar sekiranya berlaku pelanggaran, jumlah tersebut sepatutnya dianggap sebagai penalti dan oleh itu tidak sah di bawah s 75 AK. Hakim Mahkamah Tinggi yang bijaksana sepatutnya menolak jumlah yang ditetapkan kerana tiada keterangan yang dikemukakan untuk menyokong jumlah tersebut atau apa-apa jumlah yang akan diputuskan oleh mahkamah. Hakim Mahkamah Tinggi yang bijaksana telah tersalah arah apabila mengarahkan ganti rugi dinilai selepas membuat kesimpulan bahawa responden gagal mengemukakan keterangan yang mencukupi untuk mengekalkan kesnya mengenai kuantum ganti rugi. Dalam keadaan tersebut, pendengaran taksiran ganti rugi bukan sahaja akan memberi peluang kedua bagi responden tetapi juga membuang masa dan sumber kehakiman. Memandangkan pelanggaran perayu, mahkamah bersetuju bahawa perayu bertanggungjawab ke atas ganti rugi yang dialami oleh responden. Walau bagaimanapun, oleh kerana responden gagal membuktikan ganti rugi tersebut, mahkamah membenarkan ganti rugi nominal (lihat perenggan 71–73).
- (6) Memandangkan undang-undang berkenaan s 75 AK kini telah pun diputuskan oleh Mahkamah Persekutuan dalam kes *Cubic*, mahkamah mendapati bahawa tiada keperluan untuk mahkamah menjawab persoalan-persoalan yang dikemukakan dalam rayuan ini (lihat perenggan 75).]

Cases referred to

- Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67, SC (refd)
- Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo Y Castaneda* [1905] AC 6, HL (refd)
- Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15, FC (folld)
- Fateh Chand v Balkishan Dass* 1964 SCR (1) 515, SC (refd)
- Hadley v Baxendale* (1854) 9 Exch 341; [1843–1860] 9 Exch 341 (refd)

- A** *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445; [2009] 4 CLJ 569, FC (refd)
Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alameloo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (refd)
- B** *Ling Peek Hoe & Anor v Ding Siew Ching and another appeal* [2017] 5 MLJ 385; [2017] 7 CLJ 641, FC (refd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (refd)
Sarwan Kumar v Madan Lal Aggrawal AIR 2003 SC 1475, SC (refd)
- C** *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] 2 AC 694, HL (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817; [1995] 2 CLJ 374, FC (folld)
- D** *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1, FC (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd)
Veheng Global Trades Sdn Bhd v AmGeneral Insurance Bhd (formerly known as Kurnia Insurance (M) Bhd) & Anor and another appeal [2019] 4 MLJ 581, FC (refd)
- E** *Wearne Brothers (M) Ltd v Jackson* [1966] 2 MLJ 155 (refd)

Legislation referred to

Contracts Act 1950 s 75

- F** **Appeal from:** Civil Appeal Nos W02 (NCVC)(W)-2290–12 of 2016 and W02 (NCVC)(W)-2243–12 of 2016 (Court of Appeal, Putrajaya)
Mubashir Mansor (Raja Nadhil Aqran Raja Aminollah with him) (Skrine & Co) for the appellant.
- G** *Wong Yee Chue (Jean Aw Yuen Hui and Wan Hsiek Eam with her) (YC Wong) for the respondent.*

Hasnah Hashim FCJ (delivering judgment of the court):

H INTRODUCTION

- I** [1] The appeals concern the application of s 75 of the Contracts Act 1950 ('the CA') in relation to the assessment of damages arising out of a termination of an agreement. There were two appeals before us, namely Civil Appeal No 02(f)-90–10 of 2018(W) and Civil Appeal No 02(f)-92–10 of 2018(W) both appeals by Tekun Nasional, the defendant in the High Court suit. For ease of reference the Civil Appeal No 02(f)-90–10 of 2018(W) will be referred to as the 'MG appeal' and Civil Appeal No 02(f)-92–10 of 2018(W) is the 'SI appeal'. In this judgment Tekun Nasional will be referred to as 'Tekun' and

Plenitude Drive (M) Sdn Bhd will be referred as 'Plenitude'.

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PRELIMINARY OBJECTION

[2] At the commencement of the hearing of the appeals, learned counsel for Plenitude raised a preliminary objection with regards to the appeals before us. Learned counsel contended that the notice of appeal ('NOA') filed by Tekun is confusing as there is an alternative prayer. The NOA reads as follows:

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- (1) The whole of the decision in the MG appeal and the SI appeal that the alleged contract between Tekun and the respondent ('PDSB') dated 18.9.2014 ('the contract') was valid and enforceable instead illegal and void; and
- (2) Alternatively, such part of the decision in the MG appeal and the SI appeal which affirmed the decision of the High Court judgment dated 15.11.2016 that Tekun shall pay PDSB that general damages to be assessed in Civil Suit No 22NCvC-382-07/2015 for breach of the contract, and the remission of the case to the High Court for the said assessment.

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[3] Learned counsel for Plenitude impressed upon us that the alternative prayer in the NOA that is, for damages to be assessed has no nexus between the issue as stated in the NOA and the question that was allowed. Both the High Court and the Court of Appeal did not decide on the agreement involving the SI. The appeal by Tekun is only in relation to the MG. If the NOA remain as it is Plenitude would have to argue on all the issues related to the claim when the questions for this court are centered on the assessment of damages, and not on the validity of the agreement. Furthermore, both the High Court and the Court of Appeal had concluded that the agreement dated 18 September 2014 was valid and enforceable and not illegal or void. The decision was made only in the MG suit. The proposed question on illegality was not allowed by the Federal Court. Learned counsel further argued that even though illegality can be raised at any time, the refusal by the Federal Court to allow the question on illegality has rendered this issue res judicata.

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[4] In relation to para 2 of the NOA, Tekun appealed against the decision in the MG appeal and the SI appeal. Learned counsel further argued that if that is the position taken by Tekun in this appeal before this court, then Plenitude will be seriously prejudiced as it would not be able to resist the appeal effectively without knowing against which part of the decision Tekun is appealing. There is effectively no appeal before this court against the Court of Appeal's decision in the Plenitude's appeal. Hence, the NOA is not only confusing but also misleading. Learned counsel for Plenitude moved this court to strike out both the appeals.

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A [5] Learned counsel for Tekun conceded and agreed to amend the NOA by deleting para (1) and amending para (2) by deleting the word ‘Alternatively’ as follows:

B Such part only of the decision in the MG appeal which affirmed the High Court judgment dated 15.11.2016 that Tekun shall pay to PDSB general damages to be assessed in Civil Suit No 22NCVC-382-07/2015 for breach of the contract, and the remission of the case to the High Court for the said assessment.

C [6] With the amendments to the NOA as proposed by learned counsel, the SI appeal was struck out. The amended NOA only relates to the order of assessment of general damages by the High Court in relation to the MG appeal.

D [7] In granting leave, the Federal Court further ordered that both the defendant’s appeals be consolidated and that there should only be one notice of appeal. This court granted leave to appeal the following questions of law:

Question 1:

E Whether the High Court, in a trial on both liability and damages for breach of contract, has any residual jurisdiction to order for assessment of damages, after it has delivered judgment and held that the plaintiff has failed to prove the damages at the trial.

Question 2:

F (a) whether a litigant who wishes to rely on s 75 of the Contracts Act 1950 must raise it in the pleadings; and

G (b) whether a litigant who wishes to rely on s 75 of the Contracts Act 1950 to defeat a claim based on a contractual provision fixing a formula for computation of the amount of damages must prove that the provision is a penalty.

THE MATERIAL BACKGROUND FACTS

H [8] Tekun is an agency under the Ministry of Entrepreneur Development established on 9 November 1998 to provide simple and quick financing facilities to Bumiputeras in order to kick-start and further expand their businesses. Tekun disburses loans and collects repayment of the loan granted. Plenitude had proposed to Tekun to develop an efficient information infrastructure system which will upgrade the loan repayment facility by introducing the MG and SI system. Under the MG system, Tekun’s collections of loan repayment will be managed and updated real time by a portable terminal linked to Tekun’s data base. The MG system will be used for collection of repayment from Tekun’s borrowers by using an ATM card via e-debit transactions. When payments are made by cash or cheque, the MG system would be able to record the transaction and key in the amount transacted

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together with the relevant data. The data of the loan repayment would be captured by the MG system and automatically uploaded to Tekun's system immediately. A receipt will then be electronically generated from the MG, followed by an SMS to the borrower confirming the transaction. The SI system is a separate software system integrating with Maybank's system to collect monthly repayments by direct debit from the accounts of the defendant's borrowers.

[9] By a letter of award dated 29 August 2014 Tekun awarded the project described as the 'Implementation and Outcome Management System Tekun Nasional' to Plenitude. The implementation was to be carried out in phases, the first phase being the Tekun MG system repayment collection system. An agreement was executed between the parties on 18 September 2014 setting out the terms and conditions agreed upon:

WHEREAS:

A. Pursuant to a Letter of Award dated 29th August 2014 (Ref: TEKUN/JBBK/10/08 (24)), PDSB has been awarded by TEKUN the following Project:

'IMPLEMENTATION & OUTCOME MANAGEMENT SYSTEM TEKUN NASIONAL'

(hereinafter referred to as *'the System'*).

B. Implementation of the System will be carried out in phases and the first phase of the System consists of application of *TEKUN Mobile Gadget Repayment Collection System* (hereinafter referred to as the *'the Project'*)

C. TEKUN is desirous of appointing PDSB to undertake the Project and PDSB is desirous of accepting such appointment upon and subject to the terms and conditions herein contained.

[10] The then CEO cum managing director of Tekun signed the agreement on behalf of Tekun. Apparently the agreement was signed after a committee in Tekun consisting of five high ranking officers had not only scrutinised but had finalised the terms and conditions of the agreement. Under the agreement Plenitude agreed to design, develop and supply all hardware, software and technology which will enable Tekun's officers to use the MG system to collect repayment of loans more efficiently. Plenitude is to supply at a minimum number of 500 mobile gadgets for Tekun's use throughout Malaysia as well as providing all relevant technical services:

4. UNDERTAKINGS OF PDSB

4.1 In connection with the Project, PDSB via its subsidiaries, appointed agents or its representatives shall provide TEKUN with the following services:

- (a) deploy a minimum number of 500 Mobile Gadgets;

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- (b) shall enhance the technology utilized by the Mobile Gadget every five (5) yeas at no cost to TEKUN;
 - (c) develop and implement systems to capture the data of the loan repayments and upload these transactions to TEKUN systems on daily basis;
- B**

- (d) supply all consumables (paper rolls) of the mobile gadgets as per TEKUN's requirements;
 - (e) provide telephone call(s) service during office hour to receive calls from TEKUN's Officer(s) and to attend to any technical problems relating to mobile gadgets transaction conducted by TEKUN's Officer(s). The repair process by the PDSB shall take not less than six
- C**

- (f) hours including the replacement of the mobile gadgets within the stipulated hours and PDSB shall have adequate spare mobile gadgets in case the mobile gadgets need replacement so as to ensure the mobile gadgets are in working condition on the next working day. Any request from TEKUN's Officer(s) received after 3 pm of normal office hour will be considered as the following day request;
- D**

- (g) allow the Mobile Gadgets to dial in to the nodes of PDSB's nationwide data network nearest to the TEKUN's Officer for the transmission of the transactions to PDSB;
- E**

- (h) facilitate payments of the e-Debit processing fees (including the Interchange Fees) on behalf of TEKUN (the authorization of which is hereby given by TEKUN to PDSB under this Agreement);
- F**

- (i) pay to TEKUN's relevant bank accounts total TEKUN's Fee and to TEKUN's total Net Loan Repayment Amount excluding fee of TEKUN and PDSB comprehending all Card Transactions made by the Customers through their e-Debit ATM Card on any given day by minimum transaction day plus five (T+5). This day(s) implies the working days of banks in Kuala Lumpur;
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- (j) save for the cash and cheque transactions PDSB shall invoice to TEKUN an amount of Ringgit Malaysia One and Fifty Cents Only (RM1.50) for each transactions before 25th day each month;
 - (k) PDSB shall pay to TEKUN the TEKUN's Entitlement as per clause 5.1 therein of Ringgit Malaysia Twenty Cents Only (RM0.20) per cash, e-debit and/or cheque transactions and such TEKUN's Entitlement shall be reimburse to TEKUN within the third week of every month, whereas TEKUN shall invoice PDSB the TEKUN's Entitlement for cash, e-debit and/or cheque transactions within the second corresponding week of every month.
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[11] The MG system was designed based on zero investment concept where all capital expenditures were to be borne by Plenitude. Pursuant to cl 5 of the agreement, Plenitude will be entitled to receive a sum of RM1.50 for every loan repayment transaction:

5. CONSIDERATION

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5.1 In consideration of PDSB bearing all costs and expenses in the carrying-out and implementation of the Project under this Agreement, PDSB shall be entitled to *Ringgit Malaysia One and Fifty Cents Only (RM1.50)* per transaction either successful e-debit, cash and/or cheque transaction(s) (*'PDSB's Entitlement'*) of the amount collected from The Borrower/Payee(s) under the Project (hereinafter referred to as *'Total Infrastructure Fee'*). TEKUN shall be entitled to receive Ringgit Malaysia Twenty Cents Only (RM0.20) per transaction from PDSB's Entitlement either cash, e-debit and cheque transaction(s) (*'TEKUN's Entitlement'*) of the Total Infrastructure Fee.

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5.2 The Parties agree that the Total Infrastructure Fee is a fixed amount of *Ringgit Malaysia One and Fifty Cents Only (RM1.50)* per transaction as agreed to by TEKUN in respect of the Project.

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[12] Plenitude completed the development of the MG system. A user acceptance test ('UAT') was conducted on 3 November 2014. Tekun, approved and accepted the MG system. On 26 November 2014, a total of 28 MG was delivered to Tekun's branches located in the Federal Territory. The remaining 472 MG plus another 181 additional MG had been checked and verified by Tekun and were ready to be delivered to all its branches throughout the country.

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[13] However, Tekun refused to collect the remaining mobile gadgets, and instead on 20 March 2015 ordered all of its officers in the Federal Territory to stop using the MG, failed to pay invoices issued by Plenitude, refused to continue with the MG system and blocked Plenitude's access to its database and system.

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[14] Aggrieved with Tekun's decision not to proceed with the MG system, Plenitude issued notices to Tekun as required under cl 10.1 of the agreement for Tekun to rectify the breach within 30 days. At a meeting on 17 April 2015 Tekun notified Plenitude of its intention to renegotiate the terms of the agreement. Tekun did not take any steps to rectify its breach. Upon the expiry of the 30 days' notice Plenitude through its solicitors issued a notice dated 27 April 2015 to terminate the agreement and demanded the sum of RM29,829,132.40 as damages. The sum of RM29,829,132.40 as damages according to Plenitude is computed based on a formula as provided under cl 11.2 of the agreement.

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[15] Plenitude filed two suits against Tekun for breach and the wrongful repudiation of the agreement by Tekun, one suit claiming RM29,829,132.40 and other reliefs including a claim for general damages for breach of contract and aggravated damages; the other suit is a claim for RM612,000 for installing and commissioning the MG system. It is Plenitude's case that it had delivered

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- A** 28 mobile gadgets to Tekun. Despite having fulfilled its obligation under the agreement, Tekun, refused and failed to give any instructions or consent to Plenitude to complete the delivery of the remaining 472 mobile gadgets as provided under the agreement. Instead Tekun directed all its officers to stop using the mobile gadgets and refused to continue with the mobile gadget project without providing any reasons for doing so.
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- C** [16] With regards to the SI system, Plenitude contended that the quotation of RM612,000 to complete the project was accepted and agreed to by Tekun. The SI system was tested and after being accepted and approved, the project went 'live' on 24 December 2014. Tekun failed to make payment of the quoted amount. Tekun, on the other hand contended that it was directed by the Ministry to terminate the agreement and that the project was being investigated by the Malaysian Anti-Corruption Commission. It was also
- D** alleged that the Managing Director/Chief Executive Officer of Tekun purportedly was not authorised to enter into the agreement as the amount involved was in excess of RM500,000 and as such the approval of the board of trustees must be procured before entering into any agreement.

- E** [17] As for the SI system, it was argued that it is not liable to pay as the agreement only concerns development of the MG system, the SI system is not provided for under the agreement and that the SI system was not part of the zero investment scheme.

F THE HIGH COURT

- G** [18] Before considering the reasoning of the Court of Appeal, it is appropriate to consider the reasons of the High Court judge. At the High Court the two suits were consolidated and tried together. After the full trial the High Court judge found that there was strong credible evidence of acquiescence by Tekun that there was a valid contract for the MG system project. Plenitude was not entitled to claim the specific contract sum in light of s 75 of the CA however, is entitled to general damages to be assessed. In respect of the SI system, Tekun is estopped from reneging on their obligation to pay under the invoice and judgment was entered against Tekun the sum of RM612,000. The High Court in Suit 618 ordered Tekun to pay a sum of RM612,000 with interest to Plenitude.
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- I** [19] In suit 382, the High Court allowed Plenitude's claim on liability and dismissed the stipulated damages RM29,829,132.40. The High Court held that the claim of RM29,829,132.40 was a claim for special damages based on the formula under cl 11.2 of the agreement. The High Court ordered damages to be assessed. The learned judge, however, reminded himself that the trial before him was conducted on the basis of liability and quantum. The learned

judge did not consider the trial to be bifurcated or for the case to be dealt with on liability first and damages to be assessed at a later stage of the proceedings, depending on the outcome of the issue of liability. He summarised this conclusion in para 157 of his grounds of judgment (GOJ):

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For my part, I am of the view that as the trial was still afoot before me and a decision had not been pronounced, I could exercise my residual discretion, as a matter of procedural fairness and justice to order damages to be assessed, *albeit* that the plaintiff was not entitled to claim the specific contract sum in light of s 75 Contracts Act 1950. As I said, whether the route which I had taken to order that damages be assessed in these circumstances, is one which will be approved by the Court of Appeal, remains to be seen.

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THE COURT OF APPEAL

[20] Both Plenitude and Tekun appealed against the decisions to the High Court. Before the Court of Appeal, the issues that arose were:

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- (a) whether the agreement was void for illegality;
- (b) whether liability had been established against Tekun; and
- (c) whether Plenitude was entitled to the sums claimed for the MG system and the SI system.

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[21] In relation to the SI appeal, the Court of Appeal affirmed the findings of the learned trial judge and in relation to the MG appeal with regard to the findings of liability, the Court of Appeal found that there was no appealable error of law or fact in the findings of the learned High Court judge. Tekun's unilateral act of suspending the MG system amounts to a breach of the agreement. It was found that the learned trial judge had considered the contemporaneous documents that were adduced and the whole circumstances and probabilities of the case. The Court of Appeal agreed that the development of the SI system was completed and UAT was successfully conducted and the system was accepted by Tekun. The SI system was uploaded onto Tekun's server and went 'live' on 24 December 2014. The High Court judge's finding on liability of both mobile gadget project and the standing instruction system was affirmed by the Court of Appeal.

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[22] On damages, the Court of Appeal disagreed with the High Court that the claim of RM29,829,132.40 was a claim for damages. The Court of Appeal found the amount claimed by Plenitude is damages quantified in accordance to the agreed formula as provided under cl 11.2 of the agreement. The Court of Appeal, however, held it to be a penalty and not claimable under s 75 of the CA. It was also found by the Court of Appeal that it is settled law that if a sum is named in a contract as the amount to be paid in case of a breach, is unreasonable, it must be treated as a penalty and therefore void under s 75 of

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A the CA. Having found so, the Court of Appeal struck it down. The Court of Appeal agreed and held that the High Court judge was correct to disallow Plenitude's claim for the said amount but agreed that nevertheless Plenitude is entitled to be compensated for any loss or damage resulting from the breach including its loss of earnings and profits, though it could not rely on cl 11.2 to stake its claim. The Court of Appeal then dismissed the appeals and ordered the matter to be remitted to the High Court for assessment of damages, in order to ensure that Plenitude is fairly and reasonably compensated for the Tekun's conduct and breach.

C [23] The sum total of the above finding is reflected in the judgment of the Court of Appeal where Tengku Maimun Tuan Mat JCA (as Her Ladyship then was) elucidated:

D [92] Whilst we find that the learned judge was correct on the law pertaining to damages, we disagree with the learned judge that the claim of RM29,829,132.40 is an item of special damages. In our view, it is general damages quantified as per cl 11.2 upon breach. Clause 11.2 appears to us to be a penalty under s 75 of the Contracts Act because it stipulates and specifies the sum as being payable upon breach. It is settled law that if a sum is named in a contract as the amount to be paid in case of breach, it is to be treated as a penalty and therefore void under s 75 (see *Selva Kumar Murugiah v Thiagarajah Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 374; *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445; [2009] 4 CLJ 569). As cl 11.2 contravenes s 75 of the Contracts Act, we are bound to strike it down under *Selvakumar* and *Johor Coastal*. It follows that the learned judge was correct to disallow the plaintiff's claim for RM29,829,132.40.

F [93] That however was not the end of the matter. Breach of contract may give rise to damages for loss of profit pursuant to s 74 of the Contracts Act. In our view, a construction of the contract as a whole discloses that cl 6.3 is part of the clause dealing with consideration or price as agreed between the parties. This is to be differentiated from cl 11.2 which is a provision for compensation on default or breach, which we found to be a penalty. Therefore in assessing damages, cl 6.3 is not caught by s 75 of the Contracts Act.

H [24] We heard this appeal on 11 August 2020. By this time, there was a new development in the law in relation to s 75 of the CA. This court had on 21 November 2018 decided on this issue in *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15 (FC).

APPLICATION OF CUBIC

I [25] Before I proceed to discuss on the issue of damages I find it is necessary to address whether *Cubic* applies to this appeal before us. The Federal Court in *Cubic* through the leading speech for the majority delivered by Richard Malanjum CJ (Sabah and Sarawak) (as he was then) articulately explained that the onus lies on the party seeking to enforce a damages clause under the said

section to adduce evidence in support. Section 75 of the CA allows reasonable compensation to be awarded subject always to the defendant proving the unreasonableness of the clause and the sum stated therein. In the event there is a dispute as to what constitutes reasonable damages to be paid, the burden of proof falls on the defendant to show that the damages clause including the sum stated under the contract is unreasonable.

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[26] *Cubic* was decided by this court on 21 November 2018, two years after the High Court's decision of this case on 15 November 2016. The Court of Appeal considered and decided the appeal on 24 April 2018 before *Cubic*. Hence, the Court of Appeal was still relying on the earlier legal position on the application of s 75 of the CA.

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[27] Learned counsel for Plenitude submitted that in *Cubic* the onus lies on the party seeking to enforce a clause under s 75 of the CA to adduce evidence that there was a breach of contract and, upon a breach the sum that must be paid by the defaulting party is as stipulated specifically by the terms of the contract. The aggrieved party will be entitled to receive a sum not exceeding the sum stipulated in the contract irrespective of whether actual damage or loss is proven. Learned counsel further argued that this court must consider and apply the principles enunciated in *Cubic* where the burden falls on Tekun to show the unreasonableness of cl 11.2 or to demonstrate based on evidence what would be reasonable compensation. Tekun failed to discharge that burden and failed to prove that cl 11.2 and the sum stipulated is not only exorbitant but unconscionable. Plenitude is, therefore entitled to the RM29,829,132.40 as agreed.

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[28] In response to the submission of learned counsel for Plenitude, learned counsel for Tekun argued that *Cubic* does not and cannot apply retrospectively as it would create injustice. Tekun's defence in both the High Court and Court of Appeal was based on the principles expounded in *Selva Kumar all Murugiah v Thiagarajah all Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 374. If the principles in *Cubic* were to apply, it would mean that the burden is on Tekun to prove the unreasonableness of cl 11.2. Clearly this was not the basis the case was argued in the High Court or in the Court of Appeal as *Cubic* was not even decided when the matter was before the courts below. The law on the respective burdens of proof of the parties at that time during the trial as well as the appeal at the Court of Appeal in respect of s 75 of the CA are as enunciated in *Selva Kumar and Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445; [2009] 4 CLJ 569.

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[29] The law on retrospectivity arose in relation to *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1, Richard Malanjum CJ (Sabah and Sarawak) (as he then was) delivered the decision of this court departed from the

A earlier legal position and held that in a civil claim when fraud is alleged the civil standard of proof is on the balance of probabilities. In the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities. Hence, post-*Sinnaiyah* the standard of proof for fraud in a civil proceeding is on a balance of probabilities.

C [30] The issue on the retrospective application of a decision of the Federal Court case was discussed in the Federal Court decision of *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alameloo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697. In that case it was held by the Federal Court that at the material time of the decision in the court below, the standard of proof for fraud in civil proceedings was beyond reasonable doubt.

D [31] Therefore, *Sinnaiyah* could not apply in the later decision of this court in *Letchumanan* as the case was filed in 2010 and decided by the trial court in 2013 before the decision in *Sinnaiyah*. The Federal Court held that the Court of Appeal had seriously misdirected itself in requiring proof of forgery on the standard of beyond reasonable doubt. Jeffrey Tan FCJ in *Letchumanan* clarified the prospective overruling of law in *Sinnaiyah* as follows:

F [89] ... There was no departure in *Sinnaiyah* from the common law position when the court said 'we should make it clear that this judgment only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims'. *The court merely underscored the retrospective and prospective effect of its decision, to apply to that appeal and to future cases, to cases as yet not filed and trials or appeals which have yet to be finally determined, but not to past cases which have reached a terminal end. The ruling in Sinnaiyah was not in the prospective only form. Sinnaiyah applies to all cases that have not been finally determined, including all pending appeals, except that in the instant appeal, it does not matter. (Emphasis added.)*

H [32] Thus, for a decision to be binding retrospectively, the case must still be at the trial stage to enable the parties to prepare and argue their case, be it a plaintiff or defendant, based on the burden of proof applicable at that material time.

I [33] Likewise in *Ling Peek Hoe & Anor v Ding Siew Ching and another appeal* [2017] 5 MLJ 385; [2017] 7 CLJ 641 the Federal Court explained that the rationale on applicability of the doctrine of prospective overruling was logical and sound. The Federal Court referred to the Indian case of *Sarwan Kumar v Madan Lal Aggrawal* AIR 2003 SC 1475 at p 1481:

... Under the doctrine of 'prospective overruling' the law declared by the Court applies to the cases arising in future only and its applicability to cases which have

attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. Invocation of doctrine of 'prospective overruling' is left to the discretion of the Court to mould with the justice of the cause or the matter before the Court. A

[34] The emphasis is on future cases and it did not affect cases that had attained finality which could only confine to cases that had already exhausted their appeal process within the court system. This is expressed by the Federal Court in *Ling Peek Hoe*. B

[28] Thus, 'the law declared by the court applies to the cases arising in future only and its applicability to cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence'. The emphasis is on future cases and it does not affect cases that have attained finality. In fact, a similar sentiment was expressed by our then Supreme Court in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; [1987] 1 CLJ 550; [1987] CLJ Rep 284 when in applying the doctrine of prospective overruling justified it 'so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which had taken place under the section prior to the date of our judgment in this matter would remain undisturbed and not be affected. C

[29] And although the word finality was not further explained in *Sarwan Kumar*, we hold the view that it could only mean those cases that have already exhausted their appeal process within the court system. D

[30] Accordingly, within our jurisdiction, we are therefore of the view that the law as declared by this court and made subject to the doctrine of prospective overruling applies to all pending cases and all those cases still under appeals within our court system. As such we cannot subscribe to the argument that future cases should mean only those cases yet to be filed with the court. E

[35] Pre-*Cubic* in applying s 75 of the CA, the burden of proof lies on the plaintiff to show that the damages as stipulated in the contract is a reasonable compensation by reference to the loss sustained by the plaintiff in consequence of the defendant's breach. In determining the reasonableness of the amount, the court must give due regards to the evidence of actual loss adduced by the plaintiff. This burden of proof upon the plaintiff as the claimant is consistent with the classic juridical principle stating that 'he who asserts must prove'. F

[36] Ramly Ali FCJ delivering the unanimous decision of the Federal Court in *Veheng Global Trades Sdn Bhd v AmGeneral Insurance Bhd (formerly known as Kurnia Insurance (M) Bhd) & Anor and another appeal* [2019] 4 MLJ 581 followed *Ling Peek Hoe* and *Letchumanan*. His Lordship explained with great clarity as follows: G

[16] Apparently the effect of 'prospective overruling' by an apex court which applies to 'future cases' has been clarified and extended in *Ling Peek Hoe* to include its applicability to all cases that have not been finally determined as well as cases pending appeal within a court system. This settled position has been adopted and H

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- A followed in the cases of *Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors* [2018] 2 MLJ 693; and *Maheswari a/p Eliathamby & Anor v Koperasi Serbaguna Kebangsaan Bhd & Ors* [2019] 1 MLJ 440; [2018] MLRAU 1 As clearly said by Jeffrey Tan FCJ in *Letchumanan Chettiar Alagappan* 'that is the common law position. There was no departure in *Sinnaiyah* from the common law position'. The
- B ruling in *Sinnaiyah* is not to be applied to past cases which have attained finality upon reaching their terminal end.
- ...
- C [19] Based on the above reasoning, we will answer question (i) in the affirmative ie that the standard of proof on a balance of probabilities for fraud cases in civil proceedings where fraud is alleged as laid down in *Sinnaiyah* is applicable to trials concluded pre-*Sinnaiyah* but judgment thereof was pending and delivered post-*Sinnaiyah*. That is the law applicable to the present case.
- D [37] Learned counsel for Plenitude relied on the case *Cubic* and submitted that there is no necessity for the plaintiff to prove of actual loss or damages as the innocent party of the breach it seeks to enforce a damages clause. *Cubic* introduced a new burden, shifting the onus to the defendant, in this case, Tekun to prove that the damages claimed by Plenitude is unreasonable and
- E unconscionable. This, according to learned counsel for Plenitude, Tekun failed to do. Learned counsel for Tekun in response argued that Tekun had presented and argued its case in the High Court based on burden of proof applicable at the material time where Plenitude bears the onus to prove the actual loss.
- F [38] If *Cubic* is applicable, Tekun must adduce evidence to prove that the damages claimed by Plenitude is unreasonable. The onus of proof in relation to s 75 of the CA at that material time lies on Plenitude, following *Selva Kumar* and *Johor Coastal*. *Cubic* should not be applicable retrospectively to cases where full trial has completed and decided by the court of first instance. The Court of
- G Appeal had decided based on the law applicable at that material time. In this case, the retrospectivity of *Cubic* will cause manifest injustice to Tekun. Therefore, it stands to reason that *Cubic* will only apply prospectively. That is, to cases where trials have not been completed.
- H [39] In its statement of claim Plenitude claimed the sum of RM29,829,132.40 as well as general damages and aggravated damages. Learned counsel for Tekun had impressed upon us that the trial in the High Court was not bifurcated; the High Court was to decide on liability and
- I damages. The evidence of damages as adduced by Plenitude at the trial was purely mathematical with no supporting evidence such as its operating expenses. The basis of Plenitude's claim is RM1.30 and at the time they filed the claim they had in fact subcontracted part of the agreement.

[40] At the conclusion of the trial the High Court found Tekun liable for breach of the agreement, but did not allow the specific amount of damages claimed by Plenitude. However, the High Court ordered that general damages to be assessed. The learned High Court judge explained in his grounds of judgment 'as the trial was still afoot before me and a decision had not been pronounced ...' he could exercise his '... residual discretion, as a matter of procedural fairness and justice to order damages to be assessed ...'.

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[41] Although Tekun had no license to carry on the business of the payment system, the agreement was not illegal. Under the agreement, Plenitude agreed to develop the MG and SI system for Tekun for purposes of collection of loan repayment. Collecting payment from its customers had been the business of Tekun for a long time and it had the requisite approval from Bank Negara to do so. As such Tekun was carrying on an approved business. The agreement with Plenitude was valid as it was to replace manual collection and therefore not an illegal business. The conduct of Tekun in unilaterally suspending the MG system allegedly because they wanted to conduct a review as to its feasibility as well as to obtain its board of trustees' approval was in fact a façade or cloak to re-negotiate the monetary terms of the agreement. The actions of Tekun tantamount to conduct which is repudiatory of the agreement and the conduct of Tekun before the issuance of the Plenitude's notice of termination was an absolute refusal by Tekun to perform their obligations under the agreement.

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[42] The unilateral act of suspending the MG system amounted to a breach of the agreement. The termination by Tekun pursuant to the direction given by the government was ineffective as the agreement had already been terminated by Plenitude. There was no evidence that Plenitude had any knowledge of any irregularity in the internal management of Tekun including the policy that any transaction above the value of RM500,000 required the approval of the board of trustees. The High Court judge was correct when he found no credible evidence that there was in existence such an internal process or procedure which required contracts with a monetary value in excess of RM500,000 to be approved by Tekun's board of trustees.

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[43] Tekun initially expected the SI system to be part of the zero investment concept and did not object to the quotation of RM612,000. The invoice that was issued was duly acknowledged by the Tekun. The Court of Appeal concluded that the reasonable inference to be drawn from the established facts would be that Tekun had agreed to the quotation of RM612,000. The High Court judge's decision on quantum of RM612,000 for the SI system was upheld by the Court of Appeal. In respect of the mobile gadget project, the learned judge ruled that the sum of RM29,829,132.40 claimed as a specific sum damages which must be strictly proven.

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A [44] Bearing in mind the applicable law on s 75 of the CA pre-*Cubic*, we now return to the central issue in this appeal. Clause 11.2 of the agreement stipulates as follows:

B 11.2 In the event that this Agreement is unilaterally terminated by either Party during the subsistence of this Agreement, the defaulting Party shall pay compensation to the other Party reflecting to that Party's Opportunity loss of income for the unexpired term of this Agreement. A Party's Opportunity loss shall be defined as the Party's Entitlement in accordance with clause 5.1 therein earned in the preceding twelve (12) months prior to the termination, multiplied by the unexpired term, measured in years of this Agreement. The illustrations of the Party's
C Opportunity loss of income shall be in the following table:

D	Party's Entitlement	x	Number of monthly transactions in the preceding twelve months prior to termination	x	'X' Years	=	Party's Opportunity loss
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E [45] Learned counsel for Tekun argued that the formula as stipulated under cl 11.2 is in essence a penalty as the sum is exorbitant and as such irrecoverable. In response learned counsel for Plenitude argued that cl 11.2 is not a penalty clause as a result of the breach by Tekun, Plenitude is entitled to the minimum amount calculated as agreed by the parties.

F [46] It was also pointed out that the agreement has not even gone beyond the 12 months as required in the formula and that cl 11.2 is clearly a penalty clause as the final sum calculated based on the formula stipulated is not only exorbitant but unreasonable.

G [47] Clause 11.2 of the agreement is explicitly clear. It provides that if the agreement is unilaterally terminated by either party during the subsistence of the agreement, the defaulting party shall pay compensation to the other party reflecting to that party's opportunity loss of income for the unexpired term of this agreement.

H [48] The Court of Appeal had made the following observation:

I [92] Whilst we find that the learned judge was correct on the law pertaining to damages, we disagree with the learned judge that the claim of RM29,829.132.40 is an item of special damages. In our view, it is general damages quantified as per cl 11.2 upon breach. Clause 11.2 appears to us to be a penalty under s 75 of the Contracts Act because it stipulates and specifies the sum as being payable upon breach. It is settled law that if a sum is named in a contract as the amount to be paid in case of breach, it is to be treated as a penalty and therefore void under s 75 (see *Selvakumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 2 CLJ 374; *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445; [2009] 4

CLJ 569). As cl 11.2 contravenes s 75 of the Contracts Act, we are bound to strike it down under *Selvakumar* and *Johor Coastal*. It follows that the learned judge was correct to disallow the plaintiff's claim for RM29,829,132.40.

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[49] The Court of Appeal found the method of calculation to be an inaccurate representation of the actual loss of profits:

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[129] However, we do not approve of the appellant's method of calculation for the loss of profits. In its pleadings the appellant claimed for over RM19m whilst in its written submissions the appellant claimed RM10,415,421.43 (and, incidentally, incorrectly added the word million behind the figure). Let it be said that such careless disregard for precision is less than satisfactory. Counsel for the appellant stated that 'this sum (and the formula used in arriving at that figure) was explained and had been proven at trial. Essentially, it is based on the average of the commissions due to the appellant for the preceding 40 months which is then multiplied with the balance (of) 20 months. The accuracy of these figures was not challenged during trial' (para 54 of the appellant's written submissions).

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[130] This calculation does not reflect the principles of compensation for loss of profits and will put the appellant in a position well beyond that which it would rightfully be in, had the contract been properly performed. A calculation based on 'commissions', that is to say receipts, is very different from a calculation based on 'profits'. To award damages based on commissions would completely disregard the fact that had the contract been properly performed the appellant would have had to incur expenses and costs of operation, among other things. The proper sum should therefore be net of all the expenses that would be reasonably incurred in the remaining 20 months period. To do otherwise would give the appellant more than they would have obtained had the contract been performed, and therefore more than what they rightfully deserved. However, contrary to the respondent's submission and the judgment of the trial judge, the mere fact that the formula was the appellant's own formulation (presumably in contradistinction with a formula provided for within the contract) is not a ground for rejecting the formula. The agreement did not stipulate a formula for calculating loss of profits, and as such the general principles of the common law will apply and a formula that best estimates the future loss of profits will be preferred by the court.

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[50] In *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177 the Federal Court recognised that an aggrieved party is entitled to damages for loss of profit. In *SPM Membrane* the claim for loss of profit was dismissed by the High Court but upheld by the Court of Appeal. The Federal Court did not approve the mode of calculation for the loss of profit and remitted the matter to the High Court for assessment of damages notwithstanding that the trial was not bifurcated. Her Ladyship, Zainun Ali FCJ reasoned:

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[118] However, we do not approve of the appellant's method of calculation for the loss of profit. In its pleadings the appellant claimed for over RM19m whilst in its written submissions the appellant claimed RM10,415,421.43 (and, incidentally, incorrectly added the word million behind the figure). Let it be said that such

- A careless disregard for precision is less than satisfactory. Counsel for the appellant stated that ‘this sum (and the formula used in arriving at that figure) was explained and had been proven at trial. Essentially it is based on the average of the commissions due to the appellant for the preceding 40 months which is then multiplied with the balance [of] 20 months. The accuracy of these figures were not challenged during trial ...
- B [119] This calculation does not reflect the principles of compensation for loss of profits and will put the appellant in a position well beyond that which it would rightfully be in, had the contract been properly performed. A calculation based on ‘commissions’, that is to say receipts, is very different from a calculation based on ‘profits’. To award damages based on commissions would completely disregard the fact that had the contract been properly performed the appellant would have had to incur expenses and costs of operation, among other things. The proper sum should therefore be net of all the expenses that would be reasonably incurred in the remaining 20 month period. To do otherwise would give the appellant more than they would have obtained had the contract been performed, and therefore more than what they rightfully deserved. However, contrary to the respondent’s submission and the judgment of the trial judge, the mere fact that the formula was the appellant’s own formulation (presumably in contradistinction with a formula provided for within the contract) is not a ground for rejecting the formula. The agreement did not stipulate a formula for calculating loss of profits, and as such the general principles of the common law will apply and a formula that best estimates the future loss of profits will be preferred by the court.
- C [120] Therefore, contrary to the respondent’s submission, we do not think that proper consideration on quantum was allowed for at trial. There were no clear submissions made as to the expenses incurred and a very loose use of the words *pendapatan and kutipan*, which shed no light on the actual loss of profits. The respondent should also take the opportunity to submit on whether the formula is a proper representation of the loss of profits, that is to say whether or not there are any other factors that could reasonably have been expected to increase or reduce collections, and corresponding commissions, be it a significant reduction in remaining arrears or for any other reason. The challenge by the respondent exclusively on the basis that loss of profits was not expressly stated in cl 8.5 was wholly inadequate.
- D ...
- E [122] ... We order that this claim be remitted to the High Court for assessment of damages, by a High Court judge on the issue of quantum occasioned by a wrongful termination of the contract.
- F
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- I [51] The disputed contract in *SPM Membrane* did not have a clause to calculate damages or loss of profits in the event of a breach. Zainun Ali FCJ observed:
- [119] ... The agreement did not stipulate a formula for calculating loss of profits, and as such the general principles of the common law will apply and a formula that best estimates the future loss of profits will be preferred by the court.

[52] The Federal Court decided that since the contract was not validly terminated, the issue of quantum became relevant:

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[120] Therefore, contrary to the respondent's submission, we do not think that proper consideration on quantum was allowed for at trial. There were no clear submissions made as to the expenses incurred and a very loose use of the words pendapatan and kutipan, which shed no light on the actual loss of profits. The respondent should also take the opportunity to submit on whether the formula is a proper representation of the loss of profits, that is to say whether or not there are any other factors that could reasonably have been expected to increase or reduce the collections, and corresponding commissions, be it a significant reduction in remaining arrears or for any other reason. The challenge by the respondent exclusively on the basis that loss of profits was not expressly stated in cl 8.5 was wholly inadequate.

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[53] Similar to the facts in this appeal before us, the trial was not bifurcated, the judge was to decide on liability and quantum, which he did. After considering the evidence adduced he found Tekun liable but dismissed Plenitude's claim of RM29,829,132.40. It was dismissed on the basis there were no evidence adduced to support Plenitude's loss of RM29,829,132.40. Plenitude had presented its case for damages, the specified sum under cl 11.2 and general damages without adducing any evidence, oral or documentary.

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[54] When there is a clause on damages, the court must evaluate the reasonableness of the clause in question. What is 'reasonable' must naturally be based on the available evidence. Abdul Aziz J in *Wearne Brothers (M) Ltd v Jackson* [1966] 2 MLJ 155 observed:

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The distinction between liquidated damages and penalty has ceased to be of great legal importance because the result in either case is that the court must determine reasonable compensation.

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[55] Section 75 of the CA provides:

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

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[56] The Federal Court in *Selva Kumar* sets out the guiding principle in construing the application of s 75 of the CA. The court must evaluate the clause against the available evidence to ascertain whether the amount calculated based on the clause is proportionate to the legitimate interest of the innocent party in the performance of the primary obligation. If the amount stipulated in the

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- A clause is exorbitant, then the clause must be regarded as an unreasonable 'penalty clause' and therefore void.

[57] Peh Swee Chin FCJ in *Selva Kumar* explained that the plaintiff's reliance on a reasonable penalty clause must be supported with cogent evidence of actual loss. The Federal Court distinguished a contract where the court would find it difficult to assess damages with a contract where the court could assess damages with settled rules. On the true construction of s 75 of the CA contains the phrase 'whether or not actual damage or loss is proved to have been caused thereby', His Lordship had this to say:

- C Where there is inherently any actual loss or damage from the evidence or nature of the claim, and damage for such actual loss is not too remote and could be assessed by settled rules, any failure to bring in further evidence or to prove damages for such actual loss or damage, will result in the refusal of the court to award such damages, despite the words 'whether or not actual damage was proved to have been caused thereby' in s 75 of the Contracts Act.
- D

[58] His Lordship further reasoned:

- E In the first place, such a literal construction would seem to be beyond the object of the section in question viz the abolition of the distinction between a penalty and liquidated damages; secondly it will produce a most unreasonable result in that it will change the existing law which is that if a plaintiff seeks to recover damages for the actual damage caused, he ought to prove them, unless he is content with the symbolic award eg of nominal damages for any infraction of his rights under a contract. This even seems to be a rule of some antiquity.

- F We hold first, that the literal construction should not be strictly adhered to and the words in question should be given a restricted or limited construction though the language used in the words in question expresses really no circumscription of the area of operation.

- G ...
- H Secondly, we therefore further hold that the words in question viz 'whether or not actual damage was proved to have been caused thereby', are limited or restricted to those cases where the court would find it difficult to assess damages for the actual damage or loss as distinct from or opposed to all other cases, when a plaintiff in each of them will have to prove the damages or the reasonable compensation for the actual damage or loss in the usual ways.

- I Thirdly, therefore, we hold that the precise attributes of such contracts in which it is difficult for a court to assess damages for the actual damage or loss are cases where there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently and such loss is not too remote, then the court ought to award, not nominal damages, but instead, substantial damages not exceeding the sum so named in the contractual provision; a sum which is reasonable and fair according to the court's of good sense and fair play.

Fourthly, we hold that in any case where there is inherently any actual loss or damage from the evidence or nature of the claim and damage for such actual loss is

- not too remote and could be assessed by settled rules, any failure to bring in further evidence or to prove damages for such actual loss or damage, will result in the refusal of the court to award such damages despite the words in question. A
- [59] The Federal Court in *Selva Kumar* approved the view adopted by the Supreme Court of India in *Fateh Chand v Balkishan Dass* 1964 SCR (1) 515. Peh Swee Chin FCJ observed as follows: B
- The ratio of the case seems to be that such ‘reasonable compensation’ must be proved according to the usual principles, and the court undertakes a consideration of the evidence adduced to see if there is any such proof or such evidence of such actual damage or loss. If there is no such evidence, there will be no award of such reasonable compensation. C
- [60] *Selva Kumar* recognises that where the court finds it difficult to assess damages as there is no known measure of damages employable, the stipulated sum may be recoverable. Thus, any failure to prove such damages will result in the refusal of the court to award such damages. Ultimately it is the court based on the evidence before it that determines what the reasonable compensation to be awarded. D
- [61] In *Johor Coastal* the Federal Court had to determine whether that part of the decision in *Selva Kumar* which obliges a party having the benefit of a liquidated damages clause to prove its losses, notwithstanding the words in s 75 of the CA ‘whether or not actual damage or loss is proved to have been caused thereby’, is correct; and whether or not parties entering into a contract are entitled to contract out of the provisions of the said section. E
- [62] The majority in *Johor Coastal* concluded that actual damages or reasonable compensation must be proved in accordance with the principles set out in *Hadley v Baxendale* (1854) 9 Exch 341; [1843–1860] 9 Exch 341 and that *Selva Kumar* is still good law. Following the principle in *Selva Kumar*, Arifin Zakaria FCJ (as His Lordship then was) delivering the majority decision of the Federal Court observed as follows: F
- [32] Reverting to the first question posed to us, based on the authorities considered above, it is my view that the legal position may be summarised as follows: G
- The appellant/vendor cannot recover or retain without proof by evidence of the loss or damage suffered as a result of the breach of the agreements. This is because s 75 of the Act provides that in every case, the court must determine what is reasonable compensation, ‘whether or not actual damage or loss is proved to have been caused thereby’. I
- [33] And as was held in *Selva Kumar* actual damages or reasonable compensation must be proved in accordance with the principles set out in *Hadley v Baxendale* (1854) 9 Exch 341; [1843–1860] 9 Exch 341.

- A [63] The United Kingdom Supreme Court's case of *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67 stated that the court may uphold an impugned clause in the absence of actual loss or damage by applying the concepts of legitimate interest and proportionality. Regardless of whether the damage is quantifiable or otherwise,
- B it is incumbent upon the court to adopt a common sense approach by taking into account the legitimate interest an innocent party may have as well as the proportionality of a damages clause in determining what would be the reasonable compensation.
- C [64] The Federal Court in *Selva Kumar* recognises the category of cases where assessment of damages would be difficult when there is no measure of damages but there is evidence of real loss. In such cases, the party relying on the damages clause need not prove actual loss. The court should award damages
- D not exceeding the sum stipulated in the contract but it must be reasonable and fair sum. Such a clause in a contract will provide certainty as to the recovery of damages when there is a breach by the other party.
- E [65] Thus, where a contract has a specific clause to calculate damages and/or loss of profits, if the plaintiff failed to prove his losses in order to receive the benefit of the clause it would necessarily mean that the plaintiff fail to prove his losses in his claim for general damages.
- F [66] It is trite law that the party claiming damages, special or general, bears the burden of proving the fact and quantum of damages suffered. Edgar Joseph Jr FCJ, writing on behalf of the Federal Court, in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15 explained that in the assessment of damages for the breach of contract, the main objective is to place a party who has sustained a loss as a result of breach
- G in the same situation as if the contract has been performed. In other words, the award for damages is compensatory in nature, and as such, the burden of proving damages or loss lies with plaintiff:
- H *Firstly*, that part of the judgment of the judge which provides that the vendor shall pay to the purchaser damages to be assessed for wrongful termination of the agreement with costs and that *Tan Sri Khoo* and the vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the purchaser of satisfying the fundamental requirement of having *to prove its loss* (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum
- I altogether, and that cannot be the law. In so saying, we are reminded of the words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* 64, TLR 177, 178:
- ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the Court, saying:

‘This is what I have lost, I ask you to give me these damages. They have to prove it’.

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This *dictum* was referred to and applied by our Court of Appeal in *John v Dharmaratnam* [1962] MLJ 187; [1961] 1 LNS 357.

And, in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635; [1990] 1 CLJ 133 ...

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[67] The formula under cl 11.2 requires calculation of Plenitude’s opportunity loss which is defined as the party’s entitlement in accordance with cl 5.1. Plenitude’s entitlement is Ringgit Malaysia one and fifty cents only (RM1.50) per transaction either successful e-debit, cash and/or cheque transaction of the amount collected from the borrower/payee(s) under the project. As a party who had suffered loss or damages as a result of the breach by Tekun, Plenitude would be entitled to be compensated. We have carefully perused through the appeal records and we do not find any evidence of damages, whether oral or documentary, proven by Plenitude to justify the claim for damages based on the agreed formula.

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[68] It is also our observation that the formula requires Plenitude to show its earnings preceding 12 months prior to the termination and the said figure must be factored in the calculation, multiply by the unexpired term and the duration of the agreement. Furthermore, under cl 11.2 of the agreement the right can only be invoked if the agreement runs for 12 months. In this case the agreement was terminated by Plenitude less than 12 months therefore under the circumstances the formula as stipulated under cl 11.2 cannot be invoked.

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[69] Before the High Court Plenitude did not adduce any evidence that sum stipulated in cl 11.2 is an accurate representation of its loss of profits so as to allow the court to determine whether or not their profit projection is highly speculative or grossly excessive to avoid unjust enrichment. On the facts and evidence Plenitude failed to prove the sum claimed based on the formula. An award of damages must be proportionate to the loss suffered. Plenitude failed to prove its losses in order to receive the benefit of the cl 11.2 and must also necessarily fail to prove its losses in its claim for general damages.

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[70] If the sum stipulated in the agreement is extravagant and unconscionable in amount in comparison with the loss which could conceivably be proved to have followed from the breach then it must be regarded as a penalty (see *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo Y Castaneda* [1905] AC 6). A genuine pre estimate of damages, on the other hand, would be anticipated damages calculated reflective of the loss that a party to an agreement may suffer as a consequence of the breach. Damages which are excessive or disproportionate are not a genuine pre-estimate of loss and may be held by the court to be a penalty and, therefore,

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A unenforceable. Lord Diplock in *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] 2 AC 694 at p 702:

B The classic form of penalty clause is one which provides that upon breach of a primary obligation under the contract a secondary obligation shall arise on the part of the party in breach to pay to the other party a sum of money which does not represent a genuine pre-estimate of any loss likely to be sustained by him as the result of the breach of primary obligation but is substantially in excess of that sum. The classic form of relief against such a penalty clause has been to refuse to give effect to it, but to award the common law measure of damages for the breach of primary obligation instead.

C [71] We agree with the Court of Appeal that cl 11.2 appears to be a penalty clause under s 75 of the CA. It is settled law that if a sum is named in a contract is exorbitant and unreasonable for it to be paid in case of breach, it must be treated as a penalty and therefore void under s 75 of the CA.

D [72] The learned High Court judge should have dismissed the stipulated amount since there was no evidence adduce to support the amount or any amount to be decided by the court. In our view the learned High Court judge had misdirected himself when he ordered damages to be assessed after having concluded that Plenitude's failure to adduce sufficient evidence to sustain its case on the quantum of damages. A perusal of the grounds of judgment of the Court of Appeal reveals that the Court of Appeal was of the view that the method of calculation formulated to be an inaccurate representation of the actual loss of profit especially so where evidence of Plenitude's earnings preceding 12 months prior to the termination were not adduced at all.

E [73] In the circumstances, we hold that in the present appeal a hearing of the assessment of damages would not only be a second bite of the cherry for Plenitude but also a waste of judicial time and resources. In view of Tekun's breach we agree that, Tekun is liable for damages suffered by Plenitude. However, since Plenitude failed to prove damages, we allow nominal damages.

F [74] For the reasons stated above, we are therefore compelled to allow the appeal in part with costs. We affirm the decision of the Court of Appeal on the issue of liability. However, we vary the order for damages to be assessed and substituted with an order that a sum of RM5,000 be awarded as nominal damages as the respondent had failed to prove damages.

G [75] Since the law on s 75 of the CA is now already decided by this court in *Cubic*, we do not find it necessary to answer the questions posed in this appeal.

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[76] My learned sister, Rohana Yusuf PCA and my learned brother, Mohd Zawawi Salleh FCJ have sight of the judgment in draft, concur with the reasons given and the conclusions reached.

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[77] In respect of costs, after considering submissions by counsels we ordered costs of RM120,000 here and below subject to allocator.

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Appeal allowed in part with costs of RM120,000 here and below subject to allocator; decision of Court of Appeal on issue of liability affirmed; order for damages to be assessed was varied and substituted with order that sum of RM5,000 be awarded as nominal damages.

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Reported by Dzulkarnain bin Ab Fatar

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